No. 2503

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. B. HAMMOND,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF AMICI CURIAE,
Filed by Leave of the Court.

E. S. PILLSBURY,
OSCAR SUTRO,
Amici Curiae.

Filed this.....day of May, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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In the brief for the plaintiff in error there is some discussion on the rule of damages. The point to which we respectfully call the court's attention relates more particularly to whether stumpage value or severed value is the true measure of damages in the case of innocent trespass.

We submit that the value of timber in the tree or of mineral *in situ* is the true measure of damages in case of wrongful taking by one acting in good faith.

Counsel for the plaintiff in error, at page 178 of their brief, refer to a decision of the Land Department of the United States under date of April 1, 1912, fixing the measure of damages, in cases of *bona fide* trespassers,

at the value of the timber "after the same has been severed from the soil, instead of the stumpage or standing value of the timber". *This decision has since been overruled* by the Land Office in the case of *John W. Henderson,* 43 L. D. 106, in an opinion written February 16, 1914, and which announces a rule more favorable to the plaintiff in error. A copy of the latter opinion, which reviews many of the authorities, is annexed as an "Appendix" hereto.

In the opinion last referred to the Land Department, as will be noted, reached the conclusion that the better rule, supported both by principle and precedent, is that the stumpage value only should be allowed. The law aims, in cases of innocent trespass, at compensation to the injured owner and no more. The value in place gives the owner compensation; the severed value would give him more than compensation.

The rule adopted by the Department of the Interior in the case of *John W. Henderson* on February 16, 1914, received still further consideration in an opinion written by the Honorable Clay Tallman, Commissioner of the General Land Office, 44 L. D. 112, which we quote in its entirety:

> "The Department of Justice and the Solicitor of the Treasury have, however, adopted the severed value rule and maintained the attitude that an offer of settlement for less than the severed value does not represent the full measure of damages in an innocent timber trespass case. The Department of the Interior, *while it adheres in principle to the correctness of the rule as laid down in its decision of February 16, 1914, supra,* believes that in deference of the views of the other Executive Depart-

ments of the Government dealing with the same subject matter, this office should demand the severed value in innocent timber trespass cases until the question can be finally and authoritatively adjudicated by the courts."

With reference to the case of *United States v. St. Anthony Railroad Company,* which is discussed at some length by counsel for the plaintiff in error, it is pointed out in the decison in the *Henderson* case, 43 L. D. 106, as in the brief of plaintiff in error, that the court in the *St. Anthony* case allowed only the stumpage value. Judge Lowell, in *Trustees of Dartmouth College v. International Paper Company,* 132 Fed. 89, called attention to the same circumstance. In the last named case, which is cited by the defendant in error at page 57 of the brief for the United States, Judge Lowell reached the conclusion after an elaborate consideration of the subject, that the measure of recovery in the case of innocent trespass is the stumpage value of the trees, i. e., the value of the timber in the tree. In the following decisions, in cases of innocent trespass, the damages allowed for timber cut or mineral removed were for stumpage, or value in place. The reasoning in practically all of the opinions proceeds on the principle, to which we have referred, that compensation should be the limit of recovery by one whose property has been the subject of an unintentional trespass.

United States v. Coughanour, 133 Fed. 224, C. C. A., 9th Circuit;

United States v. McKee, 128 Fed. 1002, 9th Circuit;

United States v. Teller, 106 Fed. 447, 8th Circuit;
United States v. Eccles, 111 Fed. 491, 8th Circuit;
United States v. Northern Pacific R. R. Co., 67 Fed. 890, 9th Circuit;
United States v. Van Winkle, 113 Fed. 903, C. C. A., 9th Circuit;
Stockbridge Iron Co. v. Cone Iron Co., 102 Mass. 86;
Powers v. United States, 119 Fed. 562, C. C. A. 6th Circuit;
Gentry v. United States, 101 Fed. 51;
United States v. Ute Coal & Coke Co., 158 Fed. 20;
Durant Mining Company v. Percy Consolidated Mining Company, 93 Fed. 166;
Turner v. Seep, 167 Fed. 646;
Lyons v. Central Coal & Coke Company, 144 S. W. 503;
Coal Creek Mining & Manufacturing Company v. Moses, 83 Tenn. 300;
Ross v. Scott, 83 Tenn. 479;
Warrior Coal & Coke Company v. Mabel Mining Company, 20 So. 918;
Sandy River Cannel Coal Co. v. White House Cannel Coal Co., 101 S. W. 319;
Bennet Jellico Coal Company v. East Jellico Coal Company, 154 S. W. 922;
Trustees of Proprietors of Kingston v. Lehigh Valley Coal Co., 88 Atl. 763;
Ib. v. Ib., 88 Atl. 768;

Little v. Greek, 82 Atl. 955;

Oakridge Coal Co. v. Rogers, 108 Pa. St. 147;

and *Waters v. Stevenson,* 13 Nev. 157, where the whole question is carefully analyzed and the authorities elaborately reviewed.

Dated, San Francisco,
May 1, 1916.

Respectfully submitted,

E. S. Pillsbury,
Oscar Sutro,
Amici Curiae.

(APPENDIX FOLLOWS.)

APPENDIX.

JOHN W. HENDERSON.

(43 L. D. 106)

Instructions February 16, 1914.

TIMBER TRESPASS—MEASURE OF DAMAGES.

In cases of innocent trespass, where timber is cut from lands of the United States, the stumpage value, and not the value after severance, is the proper measure of damages.

CONTRARY INSTRUCTIONS RECALLED AND VACATED.

Instructions of April 1. 1912, in John W. Henderson, 40 L. D., 518, recalled and vacated.

JONES, *First Assistant Secretary:*

By decision of April 1, 1912, this Department, in the case of John W. Henderson (40 L. D., 518), laid down the following rule in cases of innocent timber trespass:

> In all cases of innocent trespass, where timber has been cut from lands of the United States, whether the timber so cut has been converted by the trespasser or the innocent vendee of such trespasser, or whether it has been allowed to remain on the land where cut, the measure of damages should be the value of the timber after it has been severed from the soil and not its stumpage or standing value.

The above rule reversed the practice obtaining in this Department ever since the promulgation of the instructions of March 1, 1883 (1 L. D., 695), which provided:

> Where the trespasser is an unintentional or mistaken one, or an innocent purchaser from such a trespasser, the value of the timber at the time when first taken by the trespasser, or if it has been converted into other material, its then value, less what the labor and expense of the trespasser and his vender have added to its value, is the proper rule of damages.

* * * * * *

> In cases where settlement with an innocent purchaser of timber cut unintentionally through inadvertence or mistake is contemplated, you are instructed to report as nearly as

possible the damage to the government as measured by the value of the timber before cutting.

I have recently had occasion to consider the case of John W. Henderson, *supra,* in connection with certain proposed suits sought to be instituted.

The question presented is: What is the correct measure of damages to be recovered of an innocent trespasser upon the lands of the United States? In Wooden-ware Co. v. United States (106 U. S. 432), the second rule for the settlement of damages against a defendant in an action for timber cut and carried away from its lands is:

> Where he (the defendant) is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value *at the time of conversion,* less the amount which he and his vendor have added to its value.

The doubt arises as to the exact period indicated by the phrase "time of conversion."

In Pine River Logging Co. v. United States (186 U. S. 279), the court states at page 293 that in Wooden-ware Co. v. United States, *supra:*

> It was held that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or, if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition.

In United States v. St. Anthony R. R. Co. (192 U. S. 524), after finding that the trespass was an innocent one, the court said at page 541:

> The further question is as to the time when the value of the timber is to be ascertained.

The parties agreed that the amount of the timber growing on the lands is correctly stated in the answer, and the value thereof at the place where the timber was cut was $1.50 per thousand feet and the value upon delivery to the defendant was $12.35 per thousand feet.

At page 542 the following rule is apparently laid down:

We think that then the measure of damages should be the value of the timber after it was cut at the place where it was cut.

It should be noted, however, that the judgment was "at the rate of $1.50 per thousand feet," which, as appears in the report of the case below (114 Fed. Rep., 722), was the stumpage value.

The question of the correct measure of the damages in the case of an innocent trespasser was exhaustively considered by Judge Lowell (Trustees of Dartmouth College v. International Paper Co., 132 Fed. Rep., 92) who held that even in an action of trover the measure of recovery is the stumpage value of the trees at the time they were cut. After citing Wooden-ware Co. v. United States, Pine River Logging Co. v. United States, and United States v. St. Anthony R. R. Co., he said at page 106:

While the language thus used by the Supreme Court, upon the whole, approves as measure of damages the value of the logs immediately after their separation from the freehold, it is plain that the difference between this value and stumpage has never been expressly considered by that court. On technical grounds it is possible to argue with some force that the plaintiff should be given the value immediately after severance, but the stumpage value better accords with the principles upon which the allowance for improvements is made. Neither measure is strictly accurate, as has been pointed out already, but, if the defendant is to be allowed for any improvements,

then to deprive him of the value of the improvement first in time and most necessary, viz, that arising from severance from the realty, is to make the techincal difference between real property in the shape of a standing tree and personal property in the shape of a felled tree the cause of a great difference in substantial rights. The weight of authority outside the Supreme Court, on the whole, supports the allowance of stumpage only, and with some doubt I have decided to allow only that in this case.

The same measure was adopted in United States v. Van Winkle (113 Fed. Rep., 903) and Gentry v. United States (101 Fed. Rep., 51). In United States v. Homestake Mining Co. (117 Fed. Rep., 481), the Circuit Court of Appeals of the Eighth Circuit held that the limit of liability for damages of one who takes ore or timber from the land of another through inadvertence or mistake, or in the honest belief that he is acting within his legal rights, is the value of the ore in the mine or the value of the timber in the trees. The same holding was made in Resurrection Gold Mining Co. v. Fortune Gold Mining Co. (129 Fed. Rep., 668). It is thus apparent that in the Federal courts the great weight of authority is to the effect that the stumpage value, and not the value after severance, is the proper measure of damages in the case of an innocent trespasser. This is further strengthened by the observations of the Supreme Court in Wooden-ware Co. v. United States, at page 433, concerning English decisions in similar trespasses of coal. Justice Miller there said:

In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems to be established in those courts, that when suit is brought for the value of the coal so taken, and it has been the result of an honest mistake as to the true ownership of

the mine, and the taking was not a wilful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine—

and upon page 434 he quotes the following language of Lord Hatherley:

But "when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him *in specie.*"

Peacock et al. v. Feaster decided by the Supreme Court of Florida, January 30, 1906 (40 Southern Reporter, 74), is cited as authority for demanding the value of the timber after it has been felled. A reference to the report discloses that the decision, so far as the measure of damages is concerned, is based wholly upon an earlier decision of that court in Wright & Co. v. Skinner (34 Fla., 453). That was an action in *trover* and the court held that in such an action brought against an innocent trespasser the value of the property *at the time and place of its conversion* must govern; that when the property converted consisted of logs, the *conversion* did not become complete until they were actually removed from the owner's land and that an innocent trespasser was not entitled to any deduction for any additional value placed by him upon the property *anterior* to the time that the conversion became complete. To the same effect are Winchester v. Craig (33 Mich., 205); White v. Yawkey (108 Ala., 270); Ivy Coal and Coke Co. v. Alabama Coal and Coke Co. (135

Ala., 579); Beede v. Lamprey (64 N. H., 510); also Franklin Coal Co. v. McMillan (49 Md., 549), and Blaen Avon Coal Co. v. McCulloch et al. (59 Md., 403).

In all except the last two, the actions were the common law action of trover, which could be maintained only as to personal property. In other words, the argument is, that the timber does not become personal property until severed from the realty and that, therefore, the correct measure of damages is the value of the timber as personal property at the time of its conversion.

The Supreme Court of Pennsylvania, however, repudiated this doctrine even in a technical action of trover. Forsyth v. Wells (41 Pennsylvania State, 291). The nature of the action is sufficiently indicated by the syllabus:

1. Trover lies for coal mined upon, and carried away from another's land by mistake.

2. The measure of damages is the fair value of the coal in *place,* and such injury to the land as the mining may have caused.

The court said:

The plaintiff insists that, because the action is allowed for the coal as personal property, that is, after it had been mined or severed from the realty, therefore, by necessary logical sequence, she is entitled to the value of the coal as it lay in the pit after it had been mined, and so it was decided below. It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done.

Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form, rather than on the principle or purpose of the remedy. But this we may not do,

and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it.

The American and English Encyclopedia of Law, 2nd Edition, Volume 28, page 724, so summarizes the varying rules:

> Where, however, the defendant acted in good faith, the owner of the land has been allowed to recover only the value of the standing trees, or the stumpage value, or the value of the logs deducting the cost of felling the timber, thereby giving to him the benefit of his labor, or the value of the trees immediately after they had been severed from the land so as to become chattels and the subject of conversion.

As to the last proposition, it cites White v. Yawkey, Wright v. Skinner, and Beede v. Lamprey, *supra*.

From the above summary, it is apparent that the great weight of authority supports the rule of allowing but the stumpage value in the case of an innocent trespass. The cases allowing the additional value caused by the labor of the innocent trespasser in severing the timber from the soil are almost wholly actions which were the technical common law actions of trover which compel, in the view of those courts, a recovery of the value of the timber after it had become personal property and was converted to the defendant's use.

As in most of the states the distinction between the different forms of actions has been abolished and as the great weight of authority supports the prior uniform practice of the Department in demanding merely the *stumpage* value in the case of an innocent trespass, I am of the opinion that the stumpage value alone should be demanded in innocent trespasses.

The case of John W. Henderson (40 L. D., 518) is accordingly recalled and vacated and hereafter you will adjust cases of innocent trespass in accordance with the measure of damages herein adopted.